Malek & Joseph Au (sued as a firm) v Bank Bumiputra (M) Bhd

A

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO C-02-123 OF 1995
SITI NORMA YAAKOB, ABU MANSOR AND HAIDAR JJCA
11 AND 19 SEPTEMBER 1998

B

Civil Procedure *— Summary judgment — Triable issues — Appellant agreed to rent premises from respondent — Appellant failed to pay rental — Appellant proposed to reduce floor space — Collateral agreement — Whether appellant had raised triable issues*

C

Evidence *— Parol evidence rule — Collateral agreement — Appellant agreed to rent premises from respondent — Appellant failed to pay rental — Appellant had option to occupy half the premises and pay half rental — Whether a collateral agreement existed with the main agreement*

D

The appellant entered into a tenancy agreement ('the agreement') with the respondent to occupy the whole of the seventh floor of a building ('the demised premises') for a period of three years at a rental of RM3,869 per month. The agreement contains an option clause which enables the appellant to apply to renew the tenancy after its expiry. In breach of the agreement, the appellant failed to pay the agreed rental and the respondent terminated the agreement. The respondent applied for summary judgment against the appellant, which was granted by the trial judge. The appellant appealed, contending that at the time of negotiating the tenancy, the respondent's assistant manager had represented that it could at any time opt to occupy one-half of the demised premises and pay the corresponding monthly rental at half the agreed rate and it was this promise that had induced the appellant to take up the whole of the seventh floor. By this defence, the appellant sought the protection of s 92(b) of the Evidence Act 1950 that allows a collateral agreement to exist side by side with the main agreement that it supplements.

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Held, dismissing the appeal:

It was the appellant who had proposed to reduce the floor space and that proposal only emerged eight months after the tenancy agreement had been executed, when it found itself to be in financial problems. Therefore, the appellant could not rely on the protection of s 92(b) of the Evidence Act 1950. The trial judge had considered all the affidavit evidence and concluded that the appellant had not succeeded in raising any triable issue that ought to go for trial. Since the appellant had no arguable defence, there was no reason to disturb the trial judge's decision (see p 613B–E).

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I

[Bahasa Malaysia summary

Perayu telah mengikat suatu perjanjian penyewaan ('perjanjian tersebut') dengan penentang untuk menduduki seluruh tingkat tujuh

A sebuah bangunan ('premis tersebut') untuk tempoh selama tiga tahun pada kadar sewa RM3,869 sebulan. Perjanjian tersebut mengandungi suatu fasal opsyen yang membolehkan perayu memohon untuk membaharui penyewaan selepas tamat tempohnya. Dalam mengingkari perjanjian tersebut, perayu gagal membayar sewa yang
B dipersetujui dan penentang menamatkan perjanjian tersebut. Penentang memohon untuk penghakiman terus terhadap perayu, yang dibenarkan oleh hakim perbicaraan. Perayu membuat rayuan, dengan menghujahkan bahawa pada masa merunding penyewaan tersebut, penolong pengurus penentang telah membuat representasi bahawa perayu boleh pada bila-bila masa memilih untuk menduduki
C setengah daripada premis tersebut dan membayar sewa bulanan yang selaras pada setengah kadar yang dipersetujui dan janji inilah yang telah menyebabkan perayu mengambil seluruh tingkat tujuh. Melalui pembelaan ini, perayu meminta perlindungan s 92(b) Akta Keterangan 1950 yang membenarkan suatu perjanjian kolateral untuk wujud
D sebelah-menyebelah perjanjian utama yang disokongnya.

Diputuskan, menolak rayuan:

Ia merupakan perayu yang telah mencadangkan supaya ruang tanah dikurangkan dan cadangan itu hanya timbul lapan bulan selepas
E perjanjian penyewaan telah dilaksanakan, apabila didapati ia mempunyai masalah kewangan. Maka, perayu tidak boleh bergantung pada perlindungan s 92(b) Akta Keterangan 1950. Hakim perbicaraan telah mempertimbangkan segala keterangan afidavit dan membuat kesimpulan bahawa perayu tidak berjaya membangkitkan apa-apa isu yang boleh dibicarakan yang harus dibicarakan. Oleh kerana
F perayu tidak mempunyai pembelaan yang boleh dihujahkan, tiada sebab untuk mengganggu keputusan hakim perbicaraan (lihat ms 613B–E).]

[*Editorial note*: The appellant has applied for leave to appeal to the Federal Court vide Application No 08–64 of 1998(C).]

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Notes

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4684–4730.

For a case on collateral agreement, see 7 *Mallal's Digest* (4th Ed,
H 1998 Reissue) para 1488.

Cases referred to

Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd [1992] 2 MLJ 137 (refd)
I
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 (refd)

Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight [1983] 1 MLJ 220 (refd)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Legislation referred to

Evidence Act 1950 s 92(b)
Rules of the High Court 1980 O 14
Subordinate Courts Rules 1980 O 26A r 1

Appeal from: HCCS No 22–38 of 1991 (High Court, Kuantan)

B Vendargon (*Vendargon & Partners*) for the appellant.
Tan Weng Hung (*Zulkifli Nordin* with him) (*Maydien & Associates*) for the respondent.

19 September 1998

Siti Norma Yaakob JCA: The dispute in this appeal arises from a tenancy agreement dated 18 July 1987 entered into between the appellant, a firm of solicitors, and the respondent, the registered proprietors of the demised premises. Proceedings for vacant possession, arrears of rental and mesne profit or double rent were first commenced in the sessions court, Kuala Lumpur in 1989 but the proceedings were later transferred to the High Court at Kuantan by a consent order dated 7 January 1991.

There was, at that point of time, a pending application dated 1 July 1989 by the respondent for summary judgment under O 26A of the Subordinate Courts Rules 1980, but by an order of the senior assistant registrar dated 22 August 1991, the application was converted to an O 14 application under the Rules of the High Court 1980.

At the hearing of the O 14 application on 9 May 1994, Lamin J (as he then was) ordered the appellant to deliver vacant possession of the demised premises to the respondent within three months of the date of the order ie on or before 8 August 1994 as the tenancy had already expired by effluxion of time. As for the other claims raised in the application ie those for arrears of rental and mesne profit, the hearing of such claims was adjourned to another date. There was no appeal lodged against this decision.

At the adjourned hearing of the O 14 application on 10 February 1995, Arifin Zakaria J allowed the respondent's claims for:

(1) arrears of rental amounting to RM66,454.43 with interest at the rate of 8% per annum from 14 March;

(2) double rental amounting to RM546,812.72 calculated from 8 March 1989 until 27 January 1995 together with interest at the rate of 8% per annum calculated at the end of each month on the rentals that have accrued; and

(3) costs.

It is against this second order on the O 14 application that this appeal is founded. Before us, the appellant raised one issue to establish that it has an arguable defence for which it cannot be denied its day in court. Its defence is that it is not liable for the arrears of rental and mesne profit claimed by the respondent as there exists, besides the tenancy agreement, an oral collateral agreement that it had the option exercisable at any time to reduce the renting space of the demised premises by one-half and to pay

A the rental of that one-half occupied at the reduced rate of half of the monthly rental. As such, its liability is limited to one-half of the monthly rental due for occupying only one-half of the demised premises.

Before considering this contention, I need to highlight some pertinent and relevant clauses in the tenancy agreement so that we can have a clear
B picture of what actually is in issue.

I start with cll 1 and 2, by which the appellant agreed to occupy the demised premises, this being the whole of the seventh floor of a building which is now known as Bangunan Bank Bumiputra, Jalan Bank, 25730 Kuantan, Pahang for a period of three years commencing from
C 14 January 1987 at a yearly rental of RM46,428 to be paid on a monthly basis at the rate of RM3,869 per month. The tenancy expired on 13 January 1990.

Under cl 7(a), the respondent reserved the right to re-enter the demised premises and determine the tenancy if the appellant defaulted in its obligation to pay any part of the rentals due.

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I need also mention that the tenancy agreement contains an option clause at cl 6(h) and when read together with cl 7(d), enables the appellant to apply to renew the tenancy after its expiry for another three years, subject to the other conditions specified in cl 7(d). The tenancy agreement is, however, silent as to whether the appellant can opt at any time to reduce
E the floor space of the demised premises by one-half and to pay rental only for that one-half occupied at half the amount of the monthly rental.

It is not disputed that the appellant made the three months deposit of RM11,607 under cl 3 and used the demised premises as its offices to conduct its legal practice. That was the only payment it made and thereafter,
F in breach of the tenancy agreement, it failed to pay the agreed rental and written demands by the respondent and its solicitors for payment of all arrears of rental met with little success. On 1 March 1989 by way of another written notice, the respondent, exercising its rights under cl 7(e), terminated the tenancy agreement and demanded vacant possession and payment of all arrears of rental. When there was no response to the notice,
G the respondent sued the appellant for:

(1) vacant possession of the demised premises;

(2) RM63,414.50 being arrears of rental from May 1987 to February 1989;

H (3) double rent or mesne profit at the rate of RM3,869 per month from 8 March 1989 to date of vacant possession;

(4) costs; and

(5) any other relief that the court deems fit and equitable.

From its affidavit evidence, the appellant contends that at the time of
I negotiating the tenancy, the respondent's assistant manager, one Leonard Boudville, had represented that it could at any time opt to occupy one-half of the demised premises and pay the corresponding monthly rental at half the agreed rate and it was this promise that induced the appellant to take up the whole of the seventh floor.

By this defence, the appellant sought the protection of s 92(b) of the Evidence Act 1950 that allows a collateral agreement to exist side by side with the main agreement that it supplements. See the cases of: (i) *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16; (ii) *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220; (iii) *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 and (iv) *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* [1992] 2 MLJ 137, as authorities for this proposition of the law. As proof of this oral agreement, the appellant relied on the transcript of a telephone conversation with Leonard Boudville which was taped. The appellant contended that the contents of the telephone conversation go to show that the respondent had promised to allow them at any time to reduce occupation of the demised premises to one-half and to pay for only one-half rental.

Before us, it was argued that there was no rebuttal of this telephone conversation by the respondent. This contention, I consider, is misconceived. For there to be a rebuttal, there must first of all be proof that the contents of the telephone conversation are acceptable. The learned trial judge rejected this evidence on the ground that it was inconclusive.

I have perused the transcript and it is interesting to note that all references to the oral option came from the appellant with non-committal answers given by Leonard Boudville. At most, the latter was only willing to commit that the appellant wrote to him and he would refer the whole matter of opting to take only one-half of the demised premises to the respondent. This telephone conversation took place on 28 June 1988, almost two years after the appellant had by its own letter dated 23 July 1986 confirmed that it was 'desirous of renting the whole of the seventh floor' of the demised premises and almost one year after the tenancy agreement was executed. I also find the telephone conversation to be too general as to invite any inference that a representation was made by Leonard Boudville at the negotiation stage to induce the appellant to take up the whole of the seventh floor. In this respect, it must be remembered that the appellant is a firm of solicitors and if indeed the option to reduce the floor space was the determining factor that induced the appellant to take on the whole of the seventh floor, that option could easily have been included in the tenancy agreement as was done in cll 6(h) and 7(d), the option clauses relating to the extension of the tenancy for another three years after its expiry.

Perhaps the most telling evidence is that found in the appellant's letter dated 8 March 1988, written three months before the telephone conversation and in response to the respondent's numerous letters seeking payment of arrears of rental. In para 2 of that letter, the appellant tendered a cheque of RM5,000 in payment of part of the rentals due which it admitted stood at RM23,214 as at 15 November 1987 with a promise that the balance would be settled by the proceeds of some insurance claims which it was pursuing. It admitted that it was facing cash flow problems and this was compounded by the fact that the respondent had rejected its application for an overdraft facility. The penultimate paragraph is at para 3 which reads as follows:

> We further regret to inform you that the premises now rented by us is too large for our requirements. As such, we regretfully propose to take only one-half of the seventh floor effective from 1 April 1988. With the current amount of receivables, we are unable to afford the rental for the whole floor. Kindly therefore let us have your consent to our proposal herein.

This letter seals the appellant's fate for clearly it was the appellant who had proposed to reduce the floor space and that proposal only emerged in March 1988, eight months after the tenancy agreement had been executed and when it found itself to be in financial problems. Clearly therefore the appellant cannot rely on the protection of s 92(b) of the Evidence Act 1950.

The learned trial judge has considered all the affidavit evidence that I have alluded to and concluded that the appellant has not succeeded in raising any triable issue that ought to go for trial. He found the appellant to be liable for all sums due under the tenancy agreement. I consider this conclusion to have been correctly made for based on what I have stated in this judgment, the appellant has no arguable defence to meet. The learned trial judge has evaluated the affidavit evidence thoroughly, he has not misdirected himself as he had asked the right questions and arrived at the right conclusion.

There appears to be no reason why his decision should be disturbed and on that finding, the appeal was dismissed with costs and the deposit ordered to be paid out to the respondent to account of its taxed costs.

11 September 1998

Abu Mansor JCA: The appellant/defendant appealed to us against the decision of the learned High Court judge at Kuantan given on 10 February 1995 allowing the respondent's/plaintiff's application for an order of summary judgment to be entered against the appellant as prayed in para 10(b), (c) and (d) of the respondent's statement of claim. After hearing arguments, we unanimously dismissed the appellant's appeal with costs as it lacked merit and we hereby give our reasons for so doing.

For ease of reference, we will refer to the appellant as the defendant and the respondent as the plaintiff. It may be pertinent if we were to set down the facts of this case as follows.

From Kuala Lumpur Sessions Court Summons No 52–712–89, this case was transferred by a consent order to the High Court at Kuantan on 7 January 1991. The plaintiff by application dated 20 July 1989 had applied for summary judgment against the defendant under O 26A r 1 of the Subordinate Courts Rules 1980. And so, before the learned High Court judge, it came to be dealt as an application under O 14 of the Rules of the High Court 1980.

The plaintiff prayed for:

(a) vacant possession;

(b) rental for the period from May 1987 to and inclusive of February 1989 amounting to RM63,414.50;

(c) double rental at the rate of RM3,869 pm from 8 March 1989 until date of actual delivery of vacant possession (27 January 1995); and

(d) costs.

The learned High Court judge found as follows. This claim by the plaintiff arose out of the tenancy agreement dated 18 July 1987 ('the agreement') entered into between the plaintiff and the defendant. Under the agreement, the plaintiff leased out to the defendant the whole of the seventh floor, Bangunan Bank Bumiputra, Jalan Bank, PO Box 309, 25730 Kuantan, Pahang ('the demised premises'). The demised premises were rented out at a yearly rental of RM46,428 payable by monthly payments of RM3,869. The plaintiff claimed that the defendant had fallen into arrears of rental and the plaintiff had by itself and by its solicitor demanded payment of the arrears of rental and given notice of the termination of the tenancy to the defendant. The last and final notice of termination being the letter dated 1 March 1989. The defendant failed to comply with the said demand of the plaintiff and hence this claim. The plaintiff then applied for summary judgment against the defendant. The order for vacant possession of the demised premises was granted by this court vide order dated 9 May 1994. The matters remaining to be determined by this court are with regard to prayers (b), (c) and (d).

In the affidavit of Kalthsom bte Dato' Haji Kosai, properties department manager of the plaintiff, affirmed on 30 June 1989, the plaintiff claimed that due notice of the termination of agreement had been given to the defendant but the defendant in defiance of the same had failed to pay up the arrears of rental or deliver vacant possession. The defendant through the affidavit of Joseph Au Kong Weng affirmed on 25 September 1989, inter alia, stated as follows:

> 4.3 Prior to the agreement dated above, the defendant by a letter dated 15 May 1986, a copy of which is annexed herewith and marked as exh A, commenced negotiations with the plaintiff for the rental of one-half of the seventh floor of the said premises. Soon thereafter, at the suggestion of and in consideration of the representations of the plaintiff assistant manager, that the defendant had the option of reducing the demised premises by one-half as and when the defendant deems it fit and necessary the defendant rented the whole of the seventh floor on the terms stated in the agreement.
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> 4.5 I say that during the said negotiation, the plaintiff assistant manager specifically represented to the defendant that the defendant could opt to reduce the demised premises by one-half at anytime thereafter when the defendant felt that the renting of the whole of the seventh floor was unjustified and uneconomical.

In short, the defendant contended that acting on the representation by the plaintiff's assistant manager the defendant agreed to rent the whole of the seventh floor. In exercise of the said option, the defendant wrote to the plaintiff and informed the plaintiff of its intention to reduce the renting of the demised premises by one-half, effective from 1 April 1988. The plaintiff, he alleges, had, in breach of the said representation, refused to recognize the said option. The defendant further contended that by reason of the

A exercise of the option by the defendant, the terms and conditions of the tenancy agreement was varied to the extent that as from 1 April 1988, the tenancy is only for one-half of the demised premises at a monthly rental of RM1,833.50 and the defendant had regularly rendered the said rental to the plaintiff. To augment its case further, the defendant, through the affidavit of Joseph Au Kong Weng affirmed on 11 September 1990, B tendered what was alleged to be the telephone conversation ('tele-conversation') between Joseph Au Kong Weng and one Leonard Boudville, the then assistant manager of BBMB Properties Sdn Bhd, which allegedly took place on 28 June 1988. The defendant contended that this tele-conversation went to prove the point that the defendant had agreed to take C the whole floor on the promise made by Leonard Boudville that the defendant might, if need be, reduce the floor space. That so called promise, the defendant contended, had induced him to take up the whole of the seventh floor.

In reply to the defendant's affidavit of 25 September 1989, the plaintiff, D through the affidavit of Che' Lah bin Sulaiman affirmed on 23 June 1992, denied that there was either a contemporaneous representation from the plaintiff to the defendant or an agreement between the parties that the defendant, while occupying the whole seventh floor, could at his option take only half of the demised premises. The terms and conditions of the agreement between the plaintiff and the defendant, the plaintiff contended, E had been reduced into writing and there was nothing more to it than what was contained in the agreement. The plaintiff in the same affidavit further contended that the defendant's letter dated 8 March 1988 to the plaintiff (exh B to the defendant's affidavit in reply affirmed on 25 September 1989) would negative the defendant's own contention that there was such an F agreement between the parties to grant the defendant an option to reduce the floor space by half as and when the defendant found it necessary.

The learned judge, after having carefully considered the affidavits of the plaintiff and the defendant, came to the following conclusion:

> On examination of this letter, I agree with the plaintiff's contention that by G the said letter the defendant was making a proposal to the plaintiff for a reduction in the floor space rented by the defendant for reasons stated in the letter. And in the said letter the defendant sought the plaintiff's consent to the said proposal. The letter on its proper construction could not be regarded as an exercise of an option by the defendant.
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> The plaintiff, through the affidavit of Mohd Jaafar bin Mohd Idris H affirmed on 25 November 1994, further contends that the agreement between the two parties was reached after several exchanges of letters between the two parties. And contrary to what the defendant had alleged, the plaintiff claims that the proposal to rent the whole floor was made by the defendant, as evident by the defendant's letter dated 23 July 1986 (p 83 of the appeal record) (exh E to plaintiff's further affidavit deposed to by Mohd Jaafar bin I Mohd Idris affirmed on 25 November 1994). Paragraph 2 of the said letter reads:
>
> > 'We write to inform you that our Dato' Abdul Malek bin Mohamed will be resuming his practice with our firm. As there are space constraints, should we rent only one-half of your above building, we now write to

> inform you that we are desirous of renting the whole of the seventh floor of the above premises.'
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> Following the said letter, the plaintiff then made the offer for renting of the demised premises by the defendant. This offer is contained in the letter of 2 August 1986 (exh F to the plaintiff's affidavit affirmed on 25 November 1994). By letter dated 4 December 1986 (exh G to the plaintiff's affidavit affirmed on 25 November 1994), the defendant accepted the plaintiff's offer.

Before us, Mr Vendargon for the appellant contended that there was only one issue before us for decision. He said that there should be a trial and the defendant be given a day in court. The appellant's contention was that from the whole of the evidence, there was an oral option given to the defendant while occupying the whole floor that they could occupy only ½ of the demised premises whenever they required it. He further contended that the learned trial judge erred in law in not applying the proviso to s 92 of the Evidence Act 1950 in respect of this oral agreement.

Encik Zulklfli Nordin for the respondent strongly argued that there was absence of any collateral agreement coming under the provision to s 92 of the Act above. He submitted that the agreement arrived at between the parties was as a result of a protracted negotiation. The assertion in the defendant's affidavit that it was something different and it could include a tele-conversation could never be accepted. Further, the possibility that there was an oral option had been denied in no uncertain terms by the plaintiffs and the bank did not agree to the said proposal vide p 77 of the record of appeal. The record was clear that the defendant, experiencing some financial problems, was only proposing to take ½ of the floor. That letter was 8 March 1988 and the letter emphasized that 'we are unable to afford the rental for the whole floor. Kindly therefore let us have your consent to our proposal therein.'

For the history of the defendant coming to rent the whole floor, we have to refer to p 83 of the appeal record when the defendant's letter of 23 July 1986 stated:

> We write to inform you that our Dato' Abdul Malek bin Mohamed will be resuming his practice with our firm. As there are space constraints, should we rent only one-half of your above building, we now write to inform you that we are desirous of renting the whole of the seventh floor of the above premises.

This proposal culminated in the agreement.

The learned trial judge correctly addressed his mind to the defendant's contention of this collateral agreement. He said, at p 9 of his judgment:

> In its further affidavit in reply affirmed by Joseph Au Kong Weng on 6 January 1995, the defendant maintains that there was a contemporaneous oral agreement between the plaintiff and defendant that at any stage should the defendant wish to surrender one-half of the floor space the defendant would be entitled to do so.
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> From the several affidavits filed on behalf of the defendant, it appears that the principal ground of the defendant's case is that there was a collateral contract between the plaintiff and the defendant which existed side by side

with the main contract. This collateral contract consists of the oral undertaking given by the plaintiff's agent Leonard Boudville to the defendant to the effect that the defendant is free at any time to reduce the floor space as and when the need arises.

The defendant claims that this undertaking by Leonard Boudville had induced the defendant to enter into the agreement with the plaintiff. The counsel for the defendant in his brief reply to plaintiff's submission lucidly stated that the defendant is relying solely on proviso (b) of s 92 of the Evidence Act 1950. What s 92 provides is that as a general rule, evidence of any oral agreement is not admissible as between the parties to contradict, vary, add to or subtract from the terms of the written agreement unless the evidence sought to be introduced falls within one of the provisos to the said section. This is some time referred to as the parol evidence rule. Proviso (b) which the defendant seeks to rely on states that:

> 'the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;' ... .

The proviso is the equivalent of the English doctrine of collateral contract which is enacted into our law of evidence.

In this long judgment, the learned judge very closely and meticulously examined the defendant's contention of oral collateral agreement and the learned judge said:

> On close scrutiny of the transcript, I could not find anything intimating that the agent for the plaintiff, Leonard Boudville, had at any time agreed with the defendant that the defendant be given the option to reduce the floor area as and when required. Even assuming for a moment there exists such an intention by the parties, then the next question is what are the terms agreed to between the parties. On the question of rental for example, I don't think it can properly be assumed that in the event the floor area is reduced by half then the rental would be reduced by half. On the contrary, the defendant's own letter dated 23 July 1986 to the plaintiff (exh E to further affidavit of Mohd Jaafar bin Mohd Idris affirmed on 25 November 1994) indicated that the reason that prompted the defendant to take the whole floor was because the defendant's partner Dato' Abdul Malek will be resuming his practice. All the letters were silent on the question of the defendant's right of option to reduce the floor space as claimed by the defendant.
>
> Furthermore, if the option is so important to the defendant as the defendant now claims, I could not see any plausible reason why it could not be incorporated into the agreement. The defendant being a firm of solicitors ought to be presumed to have acted on legal advice in entering into the agreement with the plaintiff. In the circumstances of this case, I am of the view that the defendant should not be allowed to add to the express terms and conditions of the agreement based merely on the flimsy evidence that was put before the court.

And the learned judge concluded:

> For the above reasons, I find that the defendant has not succeeded in raising any triable issue that ought to be set down for trial.

The learned judge then gave judgment as prayed.

It is trite law that an appellate court will not lightly disturb the finding of the learned trial judge unless there has been an error of law, he acted on wrong principles or the decision is against the weight of the evidence. In this case, we are more than satisfied that the learned judge had acted properly in entering judgment for the plaintiff as prayed for reasons given. We have no reason to disturb his decision. We therefore dismiss the appeal with costs. The defendant appeals.

Appeal dismissed.

Reported by David Lai